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REVIEW

Centralization in Education: Why Johnny Can't Spell Bureaucracy

SCHOOL DAYS, RULE DAYS: THE LEGALIZATION AND REGULATION OF EDUCATION. Edited by David L. Kirp† & Donald N. Jensen.†† Philadelphia and London: The Falmer Press. 1986. Pp. vi, 389.

Reviewed by Neal Devins‡

In the thirty years since *Brown v. Board of Education*,¹ control of the public education system has shifted away from local school boards toward more centralized administration, at both the federal and state levels. This process, known as centralization, includes regulation and legalization of education. Inspired by concerns over equality of opportunity, school finance, and educational content, this transformation has affected education in both positive and negative ways. While the recognition that language, race, alienage, and physical disability should not serve as absolute limits to public education is of great positive value, the resulting bureaucratization of education can impair the ability of schools to respond to student needs. Determining where to draw the line between appropriate and inappropriate centralization is, of course, the issue and the problem.

Recent events suggest that Congress, the President, and the courts have erratic and often inconsistent views on centralization. In response to widespread dissatisfaction regarding overcentralization in education,² the Reagan administration proposed and Congress enacted legislation

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1. 347 U.S. 483 (1954).

2. The Reagan administration characterized such programs as "burdensome, inflexible, unresponsive, and duplicative." OFFICE OF THE PRESS SECRETARY, WHITE HOUSE, AMERICA'S NEW BEGINNING: A PROGRAM FOR ECONOMIC RECOVERY 7-1 (1981). This criticism is supported by many who feel that federal dollars, constituting only 8.6% of all public school expenditures in 1981-82, have been used excessively to direct and control local education. NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS 1982, at 21, table 14 (1982).

that grants states and localities greater freedom to determine how to spend federal educational funds.³ In contrast, both the President and Congress endorsed—as a by-product of the current Excellence in Education movement⁴—a return to the type of programs that characterized earlier federal reform efforts, with objectives and methods established in Washington.⁵ Judicial practices appear equally contradictory; for example, while the Supreme Court has interpreted the Constitution's due process clause as guaranteeing students a hearing before suspension or expulsion, the Court has not imposed procedural safeguards for corporal punishment.⁶

Scholars have also offered conflicting opinions on the appropriate role of centralization in education.⁷ Some argue that local systems cannot be trusted either to provide adequate educational resources or to ensure equality of educational opportunity.⁸ Others claim that centralization, rather than accomplishing its stated goals, saps needed vitality from the educational enterprise.⁹ One set of responses to this controversy is found in *School Days, Rule Days*, a recent collection of essays edited by David Kirp and Donald Jensen.¹⁰ Most of these essays are critical of centralization. *School Days* is thus most useful in understanding the pitfalls of centralization efforts. At this level, *School Days* accomplishes its objectives in admirable style. The authors are thoughtful and thorough in evaluating the possible problems with centralization, espe-

3. Education Consolidation and Improvement Act of 1981, §§ 552-596, U.S.C. §§ 3801-3876 (1982). For an overview discussion of this legislation, see Devins & Stedman, *New Federalism in Education: The Meaning of the Chicago School Desegregation Cases*, 59 NOTRE DAME L. REV. 1243, 1254-57 (1984).

4. For an overview discussion of recent education reform proposals, see Stedman & Jordan, *Education Reform Reports: Content and Impact*, Cong. Res. Service, (EPW) No. 86-56 (Mar. 17, 1986) (on file with author).

5. See, e.g., Excellence in Education Act, 20 U.S.C.A. §§ 4031-37 (West Supp. 1986).

6. Compare *Goss v. Lopez*, 419 U.S. 565 (1975) (due process required before suspension or expulsion) with *Ingraham v. Wright*, 430 U.S. 651 (1977) (no hearing or notice required prior to imposition of corporal punishment).

7. See generally *Rethinking the Federal Role in Education*, 52 HARV. EDUC. REV. 371 (1982) (symposium airing debate on the appropriate role of federal government in education); *The Impact of Federal Funding: Lessons Learned*, 15 EDUC. & URB. SOC'Y 267 (1983) (review and commentary on experience with a federal role in education).

8. See, e.g., NATIONAL GOVERNORS' ASS'N, TIME FOR RESULTS: THE GOVERNORS' 1991 REPORT ON EDUCATION (1986) (statewide efforts necessary to ensure educational preferences); Doyle & Finn, *American Schools and the Future of Local Control*, 77 PUB. INTEREST 77, 80-85 (Fall 1984) (state control needed to insure attainment of acceptable educational standards).

9. See, e.g., D. KIRP, JUST SCHOOLS: THE IDEA OF RACIAL EQUALITY IN AMERICAN EDUCATION (1982) (sensitivity to local politics, not national standards, is key to effective school desegregation); Kirst, *The Changing Balance in State and Local Power to Control Education*, 66 PHI DELTA KAPPAN 189 (1984) (commentary on the increased state control and diminished federal and local control of education).

10. SCHOOL DAYS, RULE DAYS: THE LEGALIZATION AND REGULATION OF EDUCATION (D. Kirp & D. Jensen eds. 1986) [hereinafter SCHOOL DAYS].

cially where pedagogical and civil rights objectives are threatened by programs that invite abuse and inefficiency rather than reform.

These assessments, for the most part, look narrowly at the implementation of various programs and do not question the values that underlie centralization. Consequently, although many of the essays highlight defects in centralization, the authors might actually prefer a modified version of the program at issue rather than no program at all. Indeed, as Kirp states in the book's introduction, "Except to the ideologue or the willful oversimplifier, the choice between more or fewer rules, more or less law, is necessarily a matter of degree" (p. 12).¹¹

School Days, Rule Days, however, is incomplete. Despite the accurate descriptions of centralization's extremes,¹² the book pays insufficient attention to instances where centralization does work¹³ or where the costs of regulation are outweighed by some fundamental social objective.¹⁴ Moreover, *School Days*, rarely recognizes that centralization often reflects public attitudes and beliefs.¹⁵ For these reasons, Kirp and Jensen's work only fully satisfies one of the two objectives necessarily involved in works on this subject; an understanding of the risks of centralization.

This Review argues that an exploration of the rationale behind centralization and a discussion of instances where centralization proves effective is an equally important objective. I examine *School Days, Rule Days*'s arguments that educational progress is impeded by deficiencies in the present scheme, including: the failure of the judicial system to recognize conflicts within minority communities; the disruptive effect of due process proceedings on creative teaching and the equitable distribution of school resources; and the reliance on regulations that prove ineffective because they are either unreasonably burdensome or their sanctions are too severe. I conclude that, while these analyses raise significant questions, thoughtful reform cannot occur without some understanding of the values underlying regulation and the possible effectiveness of centralization. My goal is to demonstrate the value of including such materials in works on this subject.

Part I of this Review introduces the scope of centralization in educa-

11. Kirp further suggests that most of the authors "recognize that regulation may sometimes be a good and needed thing . . . ; that the present regulatory regime may be preferable to the politically likely alternatives; and that . . . a course reform is sounder than policy abdication at the national level." Kirp, *Introduction: The Fourth R: Reading, Writing, 'Rithmetic—and Rules*, in *SCHOOL DAYS*, *supra* note 10, at 1, 13. I disagree. For the most part, these essays do not offer constructive suggestions for the reform of the program at issue. See *infra* Part III.

12. See *infra* notes 41-61 and accompanying text.

13. See *infra* notes 88-99 and accompanying text.

14. See *infra* notes 62-73 and accompanying text.

15. See *infra* notes 74-87 and accompanying text.

tion. This discussion concludes that although regulation and legalization envelop much of our educational system, courts, legislators, and administrators frequently shun opportunities to expand their power over local educational authority. Consequently, despite clear cases of regulatory excess, courts and legislators are cognizant of the risks of centralization. Furthermore, this discussion reveals that centralization efforts often conform with national policy concerns; therefore, to understand the proper reach of centralization, one must attend to the appropriate role of public opinion.

Part II assesses the costs of centralization as described in *School Days*. I pay special attention to those essays concerning legalism in education. This Part reveals that *School Days* limits itself to a consideration of problems that may develop when a local school system must comply with the dictates of some central authority. The authors rarely consider the prospect that these costs may be outweighed by the social good achieved via centralization. Moreover, no essay in *School Days* is principally concerned with a centralization program that has accomplished its objectives.

Part III is a critique of the Kirp-Jensen collection. I place great emphasis on the book's failure to consider the impetus behind the centralization programs it evaluates. Through the use of case studies, this critique demonstrates that centralization is both a result of balancing social good against social cost and a reflection of public opinion. I argue that since education is a public good, it is appropriate that centralization reflect public opinion. Finally, I note instances where centralization programs have proved effective.

I

THE DIMENSIONS OF CENTRALIZATION

Centralization comes from many sources, involving all branches of federal and state government. The remarkable degree to which each of these sources contributes to educational policy elucidates the pervasiveness of centralization in education.

Court involvement in educational policy is legion.¹⁶ Since *Brown*, courts have been the receptacles of efforts to seek equality in education. Statistics bear this out: from 1946-56, 112 federal court decisions con-

16. David Tyack, in his historical review of court challenges to education practices, discovered that while courts have always played some role in education policy matters, judicial involvement has grown exponentially both in terms of the number of cases and the significance of such cases. Tyack, *Toward a Social History of Law and Public Education*, in *SCHOOL DAYS*, *supra* note 10, at 212-37. He notes that even in the period prior to *Brown*, where going to court was a "last resort," parents went to court "[w]hen dominant cultural groups used laws to enforce their values on others" and "when professional educators used state school codes to enforce their version of the one best system." *Id.* at 214.

cerned equality in education; from 1956-66, 729 decisions; and from 1966-76, 1273 decisions (p. 229). Not surprisingly, constitutional rulings made by federal courts have dramatically influenced the structure of contemporary education. These rulings, aside from insisting that the *Brown* mandate be enforced,¹⁷ have demanded that students receive a due process hearing prior to suspension,¹⁸ that students have meaningful first amendment rights,¹⁹ that religion not be "established" in the public educational system,²⁰ and that all students have access to the public educational system.²¹ Statutory rulings made by federal courts likewise have been influential in defining the reach and applicability of antidiscrimination laws.²²

State courts have also become increasingly involved in reviewing the policies and practices of school boards and state education departments. Donald Jensen and Thomas Griffin's study of the legalization of educational policymaking in California (pp. 325-42) discovered changes in both the use and reach of state court decisions analogous to the post-*Brown* litigation explosion in federal courts. These decisions, like federal lawsuits, increasingly involve individual liberties and civil rights (p. 331). Moreover, many state courts have read into their constitutions a right for children in one district to receive like resources as children in another.²³

Despite the significant role played by the judiciary, administrative rulemaking and legislative mandates remain the primary source of centralization in education. Eugene Bardach, in his essay "Educational Paperwork" (pp. 124-44), reveals the awe-inspiring dimensions of state and federal regulation. According to Bardach:

In the six-month period between July and December 1981 . . . California schools and school districts were obliged to submit to the State Depart-

17. See generally the cases discussed in Devins, *School Desegregation Law in the 1980's: The Courts' Abandonment of Brown v. Board of Education*, 26 WM. & MARY L. REV. 7 (1984).

18. *Goss v. Lopez*, 419 U.S. 565 (1975).

19. *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969). *Tinker* and other student rights cases are discussed in Lawrence Friedman, *Limited Monarchy: The Rise and Fall of Student Rights*, in *SCHOOL DAYS*, *supra* note 10, at 238-54.

20. *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963) (Bible reading); *Engel v. Vitale*, 370 U.S. 421 (1962) (school prayer).

21. *Plyler v. Doe*, 457 U.S. 202 (1982).

22. See, e.g., *Grove City College v. Bell*, 465 U.S. 555 (1984) (colleges that receive federal financial assistance must obey statute prohibiting sex discrimination); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (denying tax-exempt status to racially discriminatory private schools); *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983) (city's employment policies violated Civil Rights Act, but no compensatory damages allowed absent evidence of discriminatory intent); *Board of Educ. v. Rowley*, 458 U.S. 176 (1982) (public schools are not required to provide sign language interpreter to deaf child in the classroom).

23. The U.S. Constitution does not recognize such a right. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution."); see also Kirp & Jensen, *The New Federalism Goes to Court*, in *SCHOOL DAYS*, *supra* note 10, at 368, 374.

ment of Education seventy-eight different annual reports on one or another matter . . . Each month during this same period, another five reports were due . . . Twelve quarterly reports were due . . . And, up to sixty-nine reports, due 'as required,' could also have been called for . . . (p. 124).

Moreover, state regulatory demands are likely to increase as the state's share of the education budget grows larger.²⁴ Thirty-five percent of the average state budget is directed toward education, and the state share of education finance now eclipses the local school district contribution.²⁵ This increased contribution, largely inspired by the Excellence in Education movement, will likely include "a marked increase in state regulation, direct state administration, and elaborate statewide monitoring and accountability systems."²⁶

Centralization at the federal level is equally demanding. Federal regulations governing education occupy approximately 1800 pages in the Code of Federal Regulations.²⁷ Moreover, state and local agencies spend 1.2 million hours per year filling out federal forms and reports (p. 124).

While centralization clearly affects the day-to-day operations of our schools, there are real limits on the sweep of such encroachments.²⁸ These limits are reflected in recent shifts away from centralization undertaken by all three branches of the federal government. Furthermore, even when the federal government embraces centralization, its embrace appears tempered by a recognition of the need to respond to popular opinion.

First, despite the pervasiveness of regulation, courts and lawmakers have not accepted all invitations to intervene in the public education system. The Supreme Court has held that there is no constitutional right to equivalent levels of per-pupil spending,²⁹ that the Education for All Handicapped Children Act does not guarantee any particular level of education,³⁰ that corporal punishment does not violate the eighth amendment,³¹ and that school officials may institute otherwise unconstitutional

24. Doyle & Finn, *supra* note 8, at 84-85 (discussing the recent emergence of the "Excellence in Education" movement).

25. *Id.* at 86.

26. *Id.*

27. See 34 C.F.R. §§ 31-796 (1986).

28. In addition to those limitations discussed in the balance of this section, the public education system is, as a practical matter, an institution resistant to change. For example, Stanford education professor Larry Cuban asserts that for the past 80 years, the high school has presented a picture "striking in its uniformity." Cuban, *Persistent Instruction: The High School Classroom, 1900-1980*, 63 PHI DELTA KAPPAN 113, 116 (1982). Specifically, Cuban notes the "persistence of whole-group instruction, teacher talk outdistancing student talk, . . . and little student movement in academic classes." *Id.*

29. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

30. *Board of Educ. v. Rowley*, 458 U.S. 176 (1982).

31. *Ingraham v. Wright*, 430 U.S. 651 (1977).

"search and seizures" to preserve order in the schoolhouse.³² Indeed, in their review of trends in legalization (pp. 369-78), David Kirp and Donald Jensen suggest that "[t]he heyday of educational policymaking by the courts seems to have run its course . . . [A]ttention has largely shifted away from the courts and back to the legislature" (p. 368).

Nor is an increasingly expansionist federal role in education likely. The Reagan administration, for example, has articulated a "New Federalism in Education," portions of which have been enacted by Congress.³³ William Clune, in his analysis of the federal role in education (pp. 187-208), writes that the New Federalism is premised on the belief "that one cannot legislate learning, one cannot produce change in local education with grants or laws from Washington, and one cannot do anything about class-linked achievement patterns. Skepticism about the potential for government intervention is part of the neo-conservative mindset" (p. 189).

The New Federalism's success has been mixed, suggesting that, although the federal role may not be expanding, it is not shrinking. While the Reagan administration's civil rights enforcement effort has been narrowly focused (at least as compared to the that of the Carter administration),³⁴ and while block grants have replaced some categorical grant programs,³⁵ for the most part, the status quo has been preserved. As Chester E. Finn, Jr., now Assistant Secretary for the Department of Education, commented in 1983: "All the major programs—elementary, secondary, and postsecondary—remain much as they were when Jimmy Carter left office in January 1981, and so far as I can tell this situation is going to persist for the foreseeable future."³⁶ In fact, the administration has been a force behind renewed efforts to direct school officials' conduct through its involvement in the Excellence in Education movement, its efforts to open up public schools to voluntary religious groups, and its proposal to institute antidrug programs in school systems.³⁷

The administration's ardent support of such initiatives makes an

32. *New Jersey v. T.L.O.*, 105 S. Ct. 733 (1985).

33. The Reagan administration, in order to decentralize the federal role, has proposed elimination of the Department of Education, streamlining government regulation, and reducing the education budget. See Doyle & Hartle, *Ideology, Pragmatic Politics, and the Education Budget*, in *MAINTAINING THE SAFETY NET: INCOME REDISTRIBUTION PROGRAMS IN THE REAGAN ADMINISTRATION* 119-53 (J. Weicher ed. 1984). Parts of the New Federalism have been enacted into law. See Education Consolidation and Improvement Act of 1981, §§ 552-96, 20 U.S.C. §§ 3801-76 (1982).

34. See, e.g., Devins, *Closing the Classroom Door on Civil Rights*, 11 HUM. RTS. 26 (Winter 1984) (review of Reagan Justice Department approach to school desegregation).

35. See Devins & Stedman, *supra* note 3, at 1254-57.

36. Finn, *Reflections on "The Disassembly of the Federal Educational Role,"* 15 EDUC. & URB. SOC'Y 389, 390 (1983).

37. See, e.g., Weinraub, *Republicans Prod the White House to Move on Drugs*, N.Y. Times, Aug. 8, 1986, at A1, col. 6 (discusses proposal to fight drug use through Department of Education).

important, albeit obvious, point: Centralization efforts will be supported if they conform with national policy concerns. Nowhere is this clearer than with the administration's recent proposal to extend federal funding to school districts that offer plans to reduce drug use, contingent on the districts' progress in this effort.³⁸ The administration embraces the "effect-based standard" for federal funding in this context, the same type of condition that it opposed in the granting of federal funds for school desegregation,³⁹ because the antidrug campaign reflects a fundamental nationwide concern. As this proposal demonstrates, whenever universal educational concerns are involved, centralization of education becomes a more significant administration preference than its New Federalism in education.

II

THE COST OF CENTRALIZATION: *SCHOOL DAYS, RULE DAYS DESCRIBED*

Most of the essays in *School Days, Rule Days* offer critical assessments of centralization in education, focusing on the problems that can develop when a local school system is coerced by courts, lawmakers, and administrators. This approach reveals that regulation and legalization may work serious harm to the pedagogical objectives of schools. Paperwork requirements, the provision of educational services to handicapped and limited-English students, and court-ordered reform all take a heavy toll on very finite resources. Furthermore, the need to stay within the letter of the law may limit the creativity and authority of teachers. Finally, the judicial inquiry may prove counterproductive because it fails adequately to consider nonparty interests or possible political obstacles.

These concerns are quite serious and provide good reason to question the efficacy of regulation and legalization in education. Because post-New Deal reform in education inevitably involves some type of centralization,⁴⁰ these words of caution serve an essential function. This Part explores in some detail the *School Days, Rule Days* critique of legal-

38. See H.R. DOC. NO. 266, 99th Cong., 2nd Sess. 25 (message from the President transmitting draft of Drug Free America Act of 1986), *final version of legislation reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3207.

39. *School Desegregation: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 27-31 (1982) (testimony of Thomas I. Atkins, General Counsel, NAACP).

40. New Deal reform efforts are discussed in Fass, *Before Legalism: The New Deal and American Education*, in *SCHOOL DAYS*, *supra* note 10, at 22-44. Fass notes that many of these programs were effective because "the federal government saw its role as simply providing funds. It selected personnel on the basis of relief needs, but left program content to various professional groups and state departments of education." *Id.* at 29. Fass, however, is ultimately critical of New Deal reform efforts, claiming that because the New Deal operated as an emergency relief program, "it failed to institutionalize its new perceptions about federal obligations for education." *Id.* at 41.

ism. It also provides a summary discussion of those essays that consider centralization that is the consequence of legislative directive or administrative fiat.

A. Legalism

Court-ordered educational reform, a subject of frequent scholarly criticism,⁴¹ is amply attacked in *School Days*. Doris Fine's essay on efforts to reform educational practices through litigation in San Francisco, "Just Schools" (pp. 302-23), considers the many wrong turns that can be made when judges administer school systems.⁴² Indeed, as Fine tells it, effective reform cannot be based on judicial action, for "adjustments to the court's competence entail serious distortions of the educational issues at stake" (p. 321). This conclusion is based on her review of three early-1970's challenges to school board practices; school desegregation, bilingual education, and the failure of the schools to teach basic skills (pp. 306-14). Only in the school desegregation lawsuit, where educational policy issues were never raised, did the court play an active role. In the other two cases the courts pointed to their lack of expertise in educational matters and deferred to school administrators (pp. 306-09).

The school desegregation lawsuit, *Johnson v. San Francisco Unified School District*,⁴³ proved a debacle because of school board mismanagement, community opposition to court-ordered busing, and limitations of the traditional plaintiff-defendant legal model. Part-time school board members, pointing to the desegregation issue as justification for their intervention in all school administration matters (pp. 303-04), were unable to establish a definable agenda. Instead, the school board was able to respond only to narrow and often conflicting constituent interests (pp. 305-06). Popular opposition to the desegregation plan exacerbated these problems. The predominantly white middle class fled the school system (p. 302), Chinese interest groups went to court to challenge the

41. See generally L. GRAGLIA, *DISASTER BY DECREE* (1976) (argues that a constitutional requirement of compulsory integration is self-defeating because individuals are legally and practically capable of escaping integration and social forces will lead individuals to escape rather than comply); R. WOLTERS, *THE BURDEN OF Brown* (1984) (discusses the failure of desegregation orders to achieve integrated public schools because of white flight); E. WOLF, *TRIAL AND ERROR* (1981) (chronicles the history of recent efforts to desegregate Detroit public schools and criticizes judicial decision to require integration rather than to forbid segregation). But see P. DIMOND, *BEYOND BUSING* (1985) (reviews legal challenges to school desegregation and Supreme Court jurisprudence regarding busing and integration); M. REBELL & A. BLOCK, *EDUCATIONAL POLICYMAKING AND THE COURTS* (1982) (review of 65 education reform lawsuits; argues that courts could accommodate these social policy controversies only by adopting a political role inconsistent with the separation of powers).

42. See also D. KIRP, *supra* note 9; Devins, *Integration and Local Politics*, 73 *PUB. INTEREST* 175 (Fall 1983) (reviewing Kirp).

43. 339 F. Supp. 1315 (N.D. Cal. 1971), *vacated and remanded*, 500 F.2d 349 (9th Cir. 1974).

desegregation plan (pp. 312-13), and the black community was itself divided on the desegregation issue (pp. 311-12). On top of this, Fine notes that the quality of the judicial inquiry was substantially hampered because "the court's own predilections on matters of both procedural and substantive law drastically . . . curtail[ed] the court's factual and legal enquiries" (p. 314). Specifically, the court, by listening only to NAACP counsel for plaintiffs and school board counsel for defendants, did not consider either the diversity of interests affected by its order or political obstacles to the implementation of its desegregation plan (pp. 310-14). The consequence of this short-sighted approach was an increase in the number of racially unbalanced schools (p. 310). In the end, the district court order "never gained more than formal and shallow administrative compliance, and was eventually abandoned" (p. 309).⁴⁴

Ironically, the questions raised by the bilingualism and quality of education litigation received substantial attention following the dismissal of those lawsuits (p. 309). Fine suggests that public concern over these issues made such reform efforts possible. She therefore concludes that "[s]chool capacities and commitments, not court orders, are the decisive factors in [educational reform]" (p. 321). This is an important point that is borne out in numerous school desegregation cases. Charlotte-Mecklenburg, for example, has been quite successful in implementing a mandatory busing plan because of support from pupils, parents, and city leaders.⁴⁵ At the other extreme, fierce public opposition to busing has left Boston and its public schools more racially divided today than fifteen years ago.⁴⁶ Fine, while recognizing that community support might make court-ordered reform effective, does not consider whether certain types of reform can only be initiated in the courts or whether certain types of social wrongs must be remedied irrespective of possible community opposition. Instead, she limits her examination to the problems underlying San Francisco's failed desegregation effort.

The root cause of the limitations of the judicial inquiry identified in Fine's essay is given extensive treatment in Deborah Rhode's essay, "Conflicts of Interest in Educational Reform Litigation" (pp. 278-300). Rhode highlights the failure of the traditional legal model when volatile social issues, involving divergent interests, are at stake.⁴⁷ Noting the predominance of class actions in educational reform cases, Rhode argues

44. In place of these education reform efforts, the school board is now confronted with the problems associated with declining student enrollments and reduced revenues, such as school closing and teacher layoffs. Fine, *Just Schools*, in *SCHOOL DAYS*, *supra* note 10, at 302-23.

45. Daniels, *In Defense of Busing*, N.Y. Times, Apr. 17, 1983, (Magazine), at 34.

46. Higgins, *Boston's Busing Disaster*, NEW REPUBLIC, Feb. 28, 1983, at 16.

47. See also Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (discussing failure of traditional civil rights groups to represent divergent interests among the black community).

that procedures must be developed that enable courts to consider adequately all affected interests. Her point of departure is the inadequacy of the Federal Rules of Civil Procedure to cope with actual or potential conflicts among class members. While acknowledging that Rule 23 requires the representative party to "fairly and adequately protect the interests of the class,"⁴⁸ Rhode notes that this requirement may be honored more in the breach than in the observation.

First, named plaintiffs are often concerned with their own interests and not those of fellow class members (p. 283). Second, dissenting class members may not have a sufficient stake in the matter to justify intervention (p. 286). If dissenting factions do intervene, the case may become unmanageable, as there may be too many voices representing too many interests (p. 289). Third, federal rules ensuring that class members be given both notice and an opportunity to comment on pretrial settlement have proven ineffective (pp. 290-93). Class members are often not given sufficient information to make an informed judgment; vocal class member's interests are given disproportionate weight. Fourth, because many reform suits are brought by public interest organizations, plaintiffs' attorneys, rather than pursuing their clients' best interests, are often advancing their organizations' ideological agendas (p. 285). For example, plaintiffs' attorneys may oppose low visibility settlements that neither provide name recognition to their organization nor serve as a meaningful precedent in future litigation. Fifth, courts are poor policers of this process (pp. 285-87). The problems of adequacy of class representation, absent some filing from dissenting class members, is not readily apparent. Moreover, courts are unwilling to play an active role in certification decisions because of pressure to clear their dockets.

Rhode's concerns certainly extend beyond educational policy reform to all institutional reform cases. Yet, these issues are particularly acute in educational reform. School desegregation litigation in Boston, Los Angeles, Chicago, and San Francisco was—or should have been—complicated by a divergence of interests among minority groups and attorneys representing their interests in court.⁴⁹ In Chicago, for example, the NAACP was not allowed to intervene in a school desegregation lawsuit initiated by the Justice Department.⁵⁰ Although the Justice Department's support of voluntary desegregation techniques clearly differed from the NAACP's views, the court reasoned that the United States should be presumed to adequately and fully represent the "public inter-

48. FED. R. CIV. P. 23(a).

49. See, e.g., Bell, *supra* note 47; Fine, *supra* note 44, at 311-13; Yeazell, *Intervention and the Idea of Litigation: A Commentary on the Los Angeles School Case*, 25 UCLA L. REV. 244 (1977).

50. *United States v. Board of Educ.*, 88 F.R.D. 679 (N.D. Ill. 1981), *cert. denied*, 471 U.S. 1116 (1985).

est.”⁵¹ Plaintiff interests have also been divided in litigation concerning schools for the retarded or the handicapped. Some families seek improvements in existing facilities, while others push for the creation of community-care alternatives (pp. 279-80).

Rhode makes several suggestions on how to address these problems. She speaks generally of the need to increase judicial awareness of class schisms and the need to improve the courts' responses to such conflicts (p. 294). She also offers several specific recommendations: requiring courts to make a factual record concerning notice and representation; requiring class counsel to submit records of consultations with class members; including any evidence of class dissension; and asking for less stringent requirements for intervention.

At the same time, Rhode recognizes that such heightened concern might not yield better results (p. 296), thereby conceding the legitimacy of concerns about “the institutional competence and accountability of courts in superintending educational policy” (p. 278). Unlike Fine, however, Rhode does not view such litigation as necessarily counterproductive. Toward the end of her essay she argues:

Though neither courts, counsel, nor parties will always be inclined or able to protect class interests, we have no reason to expect legislators or bureaucrats to do better. . . . While we cannot depend on disinterested and informed judgment by any single groups of institutional participants, we can create sufficient procedural checks and balances to prevent at least the worst abuses (p. 297).

Special interest group representation is also discussed in Donald Jensen and Thomas Griffin's study of legalism in California, “The Legalization of State Educational Policymaking in California” (pp. 325-42). Rather than consider, as Rhode does, the problems of possible conflict between litigant and class members, Jensen and Griffin point to another risk of such court-initiated educational reform, namely, special interest groups capturing a state education department.

Their study reveals that, in California at least, private organizational plaintiffs are well suited to advance their ideological objectives before the courts, while the state is ill suited to defend their educational policy priorities in a cohesive manner. Organizational plaintiffs, such as the NAACP and ACLU, have substantial experience and well-defined objectives (pp. 331-32). This experience is borne out in several ways: attorneys have substantial expertise both at trial and the negotiating table; plaintiffs are carefully selected; and proven expert witnesses have already been identified. In stark contrast, the state generally has little experience in school desegregation, school finance, and other matters likely to be

51. *Id.* at 686.

challenged by organizational plaintiffs (p. 336).⁵² In California, this problem is aggravated since these lawsuits are defended by the Attorney General's office, not the Department of Education. These attorneys, who represent the state on a wide variety of issues, are unable "to link legal tactics to general educational goals" (p. 338). Instead, these lawyers, unfamiliar with state educational policy, have substantial discretion to define legal positions that impact substantially on state educational policy.

Noting the steady increase in educational reform cases instituted by organizational plaintiffs and the problems inherent in adequately defending these lawsuits, Jensen and Griffin suggest that state control over its educational policy decisions is at risk (p. 341). This presumably is bad, for they call for "a reexamination of the way a state defends its interests in court" (p. 341). Jensen and Griffin's concern that such poor legal representation is deleterious to the state's educational policy, moreover, implies that, in their view, organizational plaintiffs are a threat to state pedagogical objectives.

Since state representation in California appears poorly organized, Jensen and Griffin's recommendation that the state link legal objectives to its pedagogical goals is sensible. Jensen and Griffin, however, fail to discuss the outcomes of these cases and the possible role that organizational plaintiffs play in ensuring the constitutional rights of California youngsters. It is therefore impossible to assess whether legalism is ultimately harmful or beneficial. All we learn is that the state's legal representation is ineffective.

The greatest condemnation of legalism in *School Days, Rule Days* concerns not court-ordered reform, but the Education for All Handicapped Act, a statute modeled after due process norms. As developed in the courts, these norms include written notice of changes in educational status, and due process hearings that afford the complainant a right to call and cross-examine witnesses as well as revise educational records (p. 347). "The Allure of Legalization Reconsidered: The Case of Special Education," written by David Neal and David Kirp (pp. 343-65), argues against "placing primary reliance on due process to effect policy change

52. Statewide statistics, at first glance, do not support this contention. For example, in California, the ACLU had only one litigation case and the NAACP three, as compared to the state, which defended numerous cases. Jensen & Griffin, *The Legalization of State Educational Policymaking in California*, in *SCHOOL DAYS*, *supra* note 10, at 325, 336. Such statistics are misleading, however. Organizational plaintiffs, such as the NAACP and ACLU, file hundreds of lawsuits each year challenging state and federal practices. Moreover, although the state is often in court defending against organizational plaintiffs, it generally has little opportunity to accumulate experience in litigating each of the specific types of claims brought by the more sophisticated institutional plaintiffs. *Id.*

[in professionally-run bureaucracies]" (p. 354).⁵³ Specifically, the authors take issue with Act provisions that grant to parents rights both to negotiate with school officials about the type of education their children will receive and to appeal the school's decision to a hearing examiner. These provisions undermine the ability of professional educators to determine what type of education is "appropriate" for handicapped students (p. 359).

Neal and Kirp find this approach ineffective. They claim the statute's egalitarian goal of securing for all handicapped children the right to an "appropriate" education is often frustrated because the meaning of appropriate education varies among and within school districts. Variability of school resources and handicapping conditions as well as differences among hearing examiners explain this result (p. 358).

Also upsetting to Neal and Kirp is the possibility that granting special rights to handicapped children may distort the allocation of limited district resources (p. 359). This problem is further "aggravated by the legal model which treats the parties to a dispute as discrete from the system in which they are located" (p. 359).

Neal and Kirp also examine the costs of placing parent and school in conflict. In their view, "legalization betrays a mistrust of schools. It may inhibit the discretion of professionals whose judgment should be exercised creatively on behalf of the child [and not on convincing a court that their actions are appropriate]" (p. 359).⁵⁴ Moreover, an analysis of challenges to school board decisions reveals that middle and upper class parents are much more likely to utilize the appeal process.⁵⁵ Such parents are better informed and, since they can afford to move their children to a private school, are more willing to risk antagonizing local school officials (p. 354).

Neal and Kirp's concerns about disproportionate resource allocation and inappropriate interference with professional discretion form the basis for their recommendation that "modest change" be made to the 1974 Act. Specifically, they urge earlier attention to developing problems, consideration of school board needs in determining what education is appropriate, and use of alternative dispute resolution techniques (pp. 358-59). These recommendations are founded on their recognition

53. Neal and Kirp suggest that the aspirations underlying such court-inspired statutory reform "include a desire for principled decisionmaking, minimization of arbitrariness, and a concern for the rights of the individual." Neal & Kirp, *The Allure of Legalization Reconsidered: The Case of Special Education*, in *SCHOOL DAYS*, *supra* note 10, at 343, 344.

54. This point is also made in Berman, *From Compliance to Learning: Implementing Legally-Induced Reform*, in *SCHOOL DAYS*, *supra* note 10, at 46, 57.

55. Legal challenges are also more likely in densely populated areas, because specialized legal talent and experts are more readily available in those areas. See Benveniste, *Implementation and Intervention Strategies: The Case of PL 94-142*, in *SCHOOL DAYS*, *supra* note 10, at 146, 157.

of both the rights of the handicapped "to enjoy essential public services and to participate in decisions affecting delivery of those services" (p. 360) and the disequilibrium of resources created by "the enfranchisement of one group with little effort to relate that group's needs to those of other claimants" (p. 361).

This approach is laudable because it recognizes the competing interests in this sensitive area. Moreover, Neal and Kirp's assessment of the costs of this program are directly related to proposed reforms that are sensitive to the values underlying this centralization initiative. Finally, in making their recommendations, the authors recognize that reform proposals must be sensitive to the changing political climate. They note that the "rhetoric of rights has waned as calls for smaller government, lower taxes and budget cuts produce a climate skeptical of new claims on the public sector and doubtful about many of the old ones" (p. 360).

B. Regulation and Legislation

School Days, Rule Days also considers centralization that results from state and federal laws and regulations. Eugene Bardach's essay concerning paperwork, "Educational Paperwork" (pp. 124-44), is typical. Bardach, while recognizing that paperwork induces a degree of compliance, (pp. 125-30), concludes that:

[M]uch paperwork in the real world is bound to be useless or worse. In part this occurs for the same reason that all regulatory paperwork—and indeed, regulation—is bound to be excessive: it imposes standardized prescriptions on highly varied problems, and this necessarily produces a large number of cases in which regulatory structures are too burdensome or are inappropriate to the true situation (p. 131).

These concerns are echoed in Robert Kagen's essay, "Regulating Business, Regulating Schools: The Problem of Regulatory Unreasonableness" (pp. 64-90). In addition to paperwork burdens, Kagen feels that much regulation is either a response to advocacy group pressure or an overreaction to "particularly dramatic" occurrences (p. 68). An example of such an occurrence, although not cited by Kagen, is the National Commission on Excellence in Education's conclusion that a "rising tide of mediocrity . . . threatens our very future as a Nation and a people."⁵⁶

Kagen also emphasizes the need for reasonable sanctions to promote effectiveness (pp. 76-83). He is a critic of the current regulatory scheme, which requires the cutoff of funds to discriminatory school systems. He argues that because this remedy is so severe and because such actions "generate strong political pressures against federal officials" (p. 75), the

56. NATIONAL COMM'N ON EXCELLENCE IN EDUCATION, *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* 5 (1983).

fund cutoff power is rarely invoked and hence ineffective (p. 75).⁵⁷ Kagen argues further that, even if a cutoff were implemented, it would be counterproductive because it would further limit educational offerings for disadvantaged students (p. 75).

Regulations may also prove ineffective if they are unreasonably burdensome. In "From Compliance to Learning: Implementing Legally-Induced Reform" (pp. 46-62), Paul Berman considers the requirement that schools provide "equal educational opportunity" to students who speak limited English or none at all. Focusing on California, which has stricter standards than the federal government, he discusses the futility of efforts to implement a policy requiring school districts to offer bilingual classes whenever there are ten or more affected students at the same grade in the same school. Under this policy, Los Angeles was required to offer classes in Spanish, Armenian, Chinese, Korean, Tagalog, and Vietnamese (p. 51). More incredibly, under a state policy that requires individual learning plans for limited-English students, Los Angeles developed such plans for seventy-five non-English languages (p. 51). Compounded with the demands of such programs, Los Angeles faced the practical problems of a shortage of bilingual teachers and potential union opposition to replacing tenured teachers with new bilingual teachers.⁵⁸

In the end, school districts often resort to unsavory tactics. For example, in order to meet a requirement that one-third of the students in bilingual classes be English speaking, some school districts place low-achieving minority students in classes with limited-English students, an approach that harms both groups (p. 54). While such practices might constitute technical compliance with the regulation, the purpose or goals of the regulation might well be frustrated (p. 54). Berman's study therefore reveals that an unduly burdensome regulatory scheme may actually defeat the social good purportedly advanced by the regulations.

Finally, regulation may harm the content of classroom learning through the more pervasive yet subtler danger of teacher dissatisfaction. In his essay "Teachers' Regulation of the Classroom" (pp. 109-23), William Muir, Jr. observes that "[r]egulations conceived in statehouses and courthouses are intended to affect what goes on in the classroom, but they presuppose teachers' continued control there. If external regulations . . . upset the authority of teachers on which order depends, then

57. The threat of fund cutoff proved extremely effective in the desegregation of Southern schools, however. See *infra* notes 90-95 and accompanying text. Kagen does not consider this matter.

58. Aside from these practical problems, Berman notes that to teach a student in a foreign language, a teacher must be sufficiently familiar with that culture to effectively accomplish pedagogical objectives. Berman, *supra* note 54, at 51.

outside interference may lead to unhappy and unintended results" (p. 109).

For example, Muir notes that teacher control and effectiveness may be limited by due process requirements that teachers justify their actions and that students be provided with an opportunity to challenge teachers' claims (pp. 116-21). While Muir does not question the fairness concerns underlying such requirements, he emphasizes the need for courts, legislators, and bureaucracies to understand the "subtlety of authority" (p. 122). Otherwise, the moral order that lies at the heart of effective teaching is undercut.

Each of the essays in *School Days*, *Rule Days* asks the same question, namely, does the program at issue accomplish its objectives in a fair and efficient manner? While the explanations differ—the sanctions are too severe, the costs are too high, the allocation of resources is thrown askew, the judicial inquiry is too short-sighted—each author finds much that is wrong with the program under scrutiny. Through these criticisms, the authors build a convincing case for reexamining various centralization techniques, and for insisting that legislators, administrators, and jurists think through the consequences of their reform efforts and constructively respond to failings in their programs. Moreover, on several occasions the authors propose ways to strengthen the programs they examine.

Despite their strengths, these essays fail to consider many matters germane to an understanding of centralization in education. Inadequate consideration is given to the impetus behind centralization efforts. With a few exceptions,⁵⁹ the authors fail to match the costs of the program against its objectives. Moreover, the authors generally do not consider the role that public opinion plays in the formulation of educational policy. *School Days* also falters by failing to acknowledge that some centralization programs accomplish their objective. In order to understand where to draw the line between appropriate and inappropriate regulation, attention must also be paid to success stories.

These weaknesses in *School Days* are explored in Part III, which argues that an understanding of the issues either ignored or given inade-

59. The book's Introduction considers this threshold issue, as do two of the essays: William Clune's assessment of the "New Federalism" in education and David Neal and David Kirp's study of special education programs. See Clune, *The Deregulation Critique of the Federal Role in Education*, in *SCHOOL DAYS*, *supra* note 10, at 187-208; Neal & Kirp, *supra* note 53, at 343-65.

Kirp also remarks in his Introduction to *SCHOOL DAYS* that the policy question is not whether centralization "is perfect but whether [on balance] it represents a relative good." Kirp, *supra* note 11, at 6. In discussing special education programs, Kirp and Neal make a similar point. Neal & Kirp, *supra* note 53, at 360-61. Clune, in his critique of the "New Federalism," emphasizes the necessity of recognizing that civil rights and other types of reforms can only be accomplished through some central authority, for they "require states and localities to do things that they do not want to do." Clune, *supra*, at 195.

quate treatment in the book is essential to an evaluation of the appropriate reach of centralization.

III

CENTRALIZATION RECONSIDERED: A CRITIQUE OF *SCHOOL DAYS, RULE DAYS*

School Days, Rule Days, although critical of centralization, does not question whether centralization is necessary to assure provision of certain essential social goods. In fact, since many of the authors suggest reforms in programs they examine, it seems likely that they support the values that underlie these programs. At the same time, most of the authors present an incomplete picture by not identifying these values and by failing to consider whether the program reflects the public consensus on where to draw the line between ensuring compliance with social norms and showing appropriate deference to schools and school systems. On a more general level, the book is also incomplete in that no essay seriously considers any instances where centralization proved effective. While such deficiencies do not eradicate the book's value, this study of the appropriate balance of power in educational policy would be significantly improved if such matters received substantial treatment.

This Part will argue that an exploration of these issues is essential to an understanding of centralization in education and *ipso facto* to an understanding of the appropriate reach of centralization. The discussion will be organized around three case studies. First, an analysis of varying teacher certification requirements reveals the relativistic nature of centralization requirements. Second, a discussion of the standards utilized in granting tax exemptions to private schools demonstrates that centralization requirements can reflect public opinion. Third, a review of federal school desegregation efforts points to the possible effectiveness of centralization measures, even under the standards utilized in *School Days*.

A. Teacher Certification

Teacher certification requirements are one mechanism by which the state seeks to guarantee that each child receives an adequate education. Under these requirements, teachers may be required to take "how to teach" courses in such subjects as public school curriculum, child development, and classroom management.⁶⁰ Over the past twenty years, this requirement has become the subject of increasing litigation between Christian educators and state education officials.⁶¹ The controversy is

60. For a description of state procedures governing the operation of nonpublic schools, see P. Kinder, *The Regulation and Accreditation of Nonpublic Schools in the United States* (1982) (unpublished dissertation available in the main library at the University of Missouri-Columbia).

61. See generally Devins, *State Regulation of Christian Schools*, 10 J. LEGIS. 351 (1983).

significant for two reasons, both of which address the relativistic nature of the centralization requirements. First, courts are evenly divided on the propriety of this requirement.⁶² Second, states that have prevailed in court have subsequently abandoned this requirement for reasons of political expediency.⁶³

In court, Christian educators claim that the certification requirement bears no rational relationship to the quality of education, pointing out that their students perform at least as well on standardized achievement tests as do students in public schools.⁶⁴ In contrast, states argue that these tests are essential to a quality education for all youngsters.⁶⁵ Court responses to these arguments are not easily reconciled. A Nebraska court has held that the certification requirement is fair and reasonable,⁶⁶ while a Kentucky court has ruled that "[i]t cannot be said as an absolute that a [noncertified] teacher . . . will be unable to instruct children to become intelligent citizens."⁶⁷

Second, several states involved in such legal proceedings have modified their requirements in the face of the expressed willingness of Christian educators to go to jail rather than abide by unfavorable court decisions.⁶⁸ In North Carolina and Nebraska, the state legislature, rather than compel enforcement of judgments against Christian schools, effectively deregulated all religious educational institutions.⁶⁹ In Maine, the state did not appeal an adverse federal district court decision.⁷⁰ Finally, Kentucky and Ohio have failed to respond legislatively or administratively to the decisions of the state supreme court that invalidated teacher certification requirements.⁷¹

(examining conflicts between fundamentalist educators and the state and arguing that courts should require the state to introduce "clear and convincing proof" that its regulatory scheme is least restrictive means of effectuating a compelling state interest regarding education).

62. Compare, e.g., *State ex rel. Douglas v. Faith Baptist Church*, 301 N.W.2d 571 (Neb.) (upholding teacher certification), *appeal dismissed sub nom.*, *Faith Baptist Church v. Nebraska*, 454 U.S. 803 (1981) with *Kentucky State Bd. for Elementary and Secondary Educ. v. Rudasill*, 589 S.W.2d 877 (Ky. 1979) (invalidating application of textbook approval, teacher certification, and school accreditation requirements to Christian schools), *cert. denied*, 446 U.S. 938 (1986). See generally Carter & Devins, *The State and the Christian Day School*, in *RELIGION AND THE STATE* 211-32 (J. Wood ed. 1985) (review of recent judicial opinions concerning teacher certification conflicts involving Christian schools).

63. See Devins, *Nebraska and the Future of State Regulation of Christian Schools*, in *GOVERNMENT INTERVENTION IN RELIGIOUS AFFAIRS*, II 107 (D. Kelley ed. 1986).

64. See *id.* at 354.

65. See *id.*

66. *Faith Baptist Church*, 301 N.W.2d at 579.

67. *Rudasill*, 589 S.W.2d at 884.

68. See Devins, *Fundamentalist Schools vs The Regulations*, Wall St. J., Apr. 14, 1983, at 28, col. 3.

69. Devins, *supra* note 63, at 113-19.

70. *Id.* at 118.

71. *Id.*

The willingness of these states to concede purportedly necessary regulations, rather than close religious schools and jail religious people, illuminates the balancing test (social good versus social cost) inherent in centralization questions. In the case of teacher certification, professionalism concerns gave way to religious liberty and parental choice. In other instances, however, religious liberty and parental choice have given way. For example, the state enjoys wide support in its efforts to prevent religious-based denials of medical treatment to children.⁷² Thus, while administrative and judicial requirements might appear pervasive in education, centralization is not an absolute. State lawmakers may eliminate teacher certification requirements. Likewise, courts, administrators, and legislators can and have dissolved other preexisting centralization schemes.⁷³

School Days, Rule Days, for the most part, does not explore the significance of the tug and pull of values. For example, Doris Fine's study of San Francisco's failed desegregation effort does not consider whether racial equality concerns are sufficiently important to justify the lowered quality of education caused by community resistance. Had such an evaluation taken place, Fine—rather than just criticize—may have considered ways to account for community needs in school desegregation cases.

Some essays in *School Days* do consider the underlying values of a centralization program. Indeed, Deborah Rhode's essay on class conflicts proposes ways to better recognize community interests. David Neal and David Kirp's study of special education is another example. The authors emphasize that "[t]hose who would undertake the legalization of a policy area must take careful account of the context into which the policy is introduced" (p. 361). Yet, these essays are the exception. Furthermore, no essay undertakes a value-based analysis of centralization. As the teacher certification question demonstrates, such an analysis can be quite instructive.

72. For example, in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the Supreme Court upheld the state's right to compel immunization of its citizens. See generally Brown & Truitt, *The Right of Minors to Medical Treatment*, 28 DE PAUL L. REV. 289 (1979) (argues that the law should allow minors greater self-determination in health matters).

73. For example, parts of the Reagan administration's "New Federalism" have been enacted into law. Education Consolidation and Improvement Act of 1981, §§ 552-96, 20 U.S.C. §§ 3801-76 (1982); see generally Devins & Stedman, *supra* note 3 (review of such "New Federalism" initiatives in education as replacement of categorical aid programs with block grants). Moreover, in addition to the teacher certification issue, state regulations governing home instruction have, on occasion, either been struck down or limited by the courts. See generally Devins, *A Constitutional Right to Home Instruction*, 62 WASH. U.L.Q. 435 (1984) (argues that the state interests in assuring the economic self-sufficiency of youth and in maintaining the smooth functioning of the political system cannot justify a total prohibition on home instruction).

B. *The Tax-Exempt Status of Private Schools*

The evolution of standards governing the granting of tax exemptions to private schools indicates that centralization may well reflect public opinion. In 1983, the Supreme Court in *Bob Jones University v. United States*⁷⁴ affirmed an IRS ruling that denied tax exemptions to racially discriminatory private schools. The ruling represented a compromise between two unpopular ideological extremes: (1) the Carter administration's 1978 proposal that tax-exempt private schools satisfy quota-like nondiscrimination enforcement standards,⁷⁵ and (2) the Reagan administration's 1982 initiative to restore the tax-exempt status of admittedly discriminatory private schools.⁷⁶

The failure of both the Carter and Reagan initiatives is significant, especially since the agency that administers the tax code, the IRS, is part of the executive branch. Under the Carter proposal, tax-exempt status would be denied to private schools that had a disproportionately low number of minority students.⁷⁷ A public outcry followed this proposal, prompting Congress to delay implementation of this procedure by withholding appropriations for its formulation and enforcement.⁷⁸ Severe criticism and political embarrassment also greeted President Reagan's contention that all educational organizations—regardless of whether or not they discriminate—were statutorily entitled to tax-exempt status.⁷⁹ The Supreme Court squarely rejected this argument in its widely applauded *Bob Jones University* decision.⁸⁰

The Court in *Bob Jones University*, however, also steered clear of Carter administration efforts to impose statistical measures of discrimination. The Court explicitly limited its holding to private schools that actively employ racially discriminatory practices.⁸¹ Moreover, the Supreme Court rejected the efforts of civil rights groups to impose judicially the Carter proposal. In its 1984 decision in *Allen v. Wright*,⁸² the Court held that civil rights plaintiffs lacked standing to challenge existing

74. 461 U.S. 574 (1983).

75. 43 Fed. Reg. 37,296 (1978).

76. See 14 TAX NOTES 150 (1982).

77. The Carter administration's proposal would have denied tax-exempt status to private schools that either (1) had been held by a court or agency to be racially discriminatory, or (2) had an insignificant number of minority students and were formed or substantially expanded at or about the time of public school desegregation in the community. 43 Fed. Reg. 37,296-97 (1978).

78. See McCoy & Devins, *Standing and Adverseness in Challenges of Tax Exemptions for Discriminatory Private Schools*, 52 FORDHAM L. REV. 441, 459-61 (1984).

79. *Id.* at 462-63.

80. See generally Galvin & Devins, *A Tax Policy Analysis of Bob Jones University v. U.S.*, 36 VAND. L. REV. 1353 (1983) (arguing that Congress, rather than the courts or the IRS, should formulate national tax policy and resolve tax-exemption issues involving private schools).

81. 461 U.S. at 595.

82. 468 U.S. 737.

IRS standards. In fact, the Court's approach to the tax exemption issue demonstrates a desire to read public consensus into the Internal Revenue Code—a desire illustrated by its holding in *Bob Jones University* that “an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy.”⁸³

This recognition of the public mood is not anomalous. In fact, much of federal educational policy appears idiosyncratic because it is more a reflection of popular opinion than pedagogy, federalism, or separation of powers. Consider some recent examples. Although Congress failed to ratify proposed constitutional amendments to prohibit forced busing and permit school prayer,⁸⁴ federal desegregation assistance cannot be used to defray busing costs, and school districts that forbid voluntary religious groups to meet on school premises risk losing all federal assistance.⁸⁵ While the Reagan administration speaks of a “New Federalism” in education,⁸⁶ it is a principal supporter of the Excellence in Education movement, tuition tax credits, religious activity in the public schools, and antinarcotics legislation.⁸⁷

For the most part, this state of affairs is not troublesome. Because education serves a public function, public values separating right from wrong should help shape policy (provided that our public conscience conforms to the Constitution). *School Days*, however, fails to consider seriously the role public attitudes and beliefs play in centralization. Instead, the authors scrutinize weaknesses in existing centralization programs. While this information is useful, it alone does not answer the question of how much centralization is appropriate. Such determinations must reflect the price that society is willing to pay to secure certain social goods or ensure compliance with certain social norms.

In light of the many excellent criticisms of centralization in the book, it is unfortunate that the authors fail to examine whether the failures of these programs have in fact frustrated their underlying purposes. Concerns about cost effectiveness, resource allocation, and the adequacy of the judicial inquiry should not be viewed as criticism of a program's objectives. Yet, even in those essays that suggest reform, the authors generally do not explain that such reform might actually further the program's goals. Consequently, many of the arguments against centralization could be made more persuasive simply by highlighting

83. 461 U.S. at 586.

84. See Migra, *Congress Turns to Equal Access After Prayer Vote*, EDUC. WEEK, Mar. 28, 1984, at 1.

85. Equal Access Act, 20 U.S.C. §§ 4071-74 (Supp. III 1985).

86. See *supra* notes 2-3 and accompanying text.

87. See *supra* notes 36-38 and accompanying text.

how the costs of these programs hinder the accomplishment of their goals.

Two of the book's strongest essays bear this out. David Neal and David Kirp, in making reform proposals for special education, emphasize that due process requirements may impede teacher effectiveness (pp. 358-59). Paul Berman's essay on regulatory unreasonableness likewise emphasizes that regulation that is not sensitive to school resources will likely prove counterproductive. *School Days* would be strengthened by greater emphasis on this connection. The criticisms would then function as constructive suggestions to make centralization programs conform to public concern.

While heightened sensitivity to the role that public consensus plays in shaping educational policy would improve the book, an exploration of the role public opinion plays in this area, such as the private school tax-exemption issue, should also have been included. This type of essay would serve as a useful reminder that centralization in education, like other policy initiatives, is ultimately accountable to popular attitudes and beliefs.

C. Federal Desegregation Programs

Another way *School Days*, *Rule Days* presents an incomplete picture of centralization is by failing to discuss centralization efforts that accomplish their objectives.⁸⁸ Although it may be true that many administrative initiatives and court-ordered reforms create more problems than they solve, a study of centralization should include some discussion of instances where a program is effective, as well as an examination of why it works. Because a reader of *School Days* emerges with a clear idea of what centralization cannot do, I would like to balance that impression with a discussion of what it can do. Some centralization programs have led to meaningful change. Civil rights enforcement efforts of the mid-1960's, as well as the enforcement of the Emergency School Aid Act of 1972 (ESAA),⁸⁹ demonstrate the possible effectiveness of regulatory programs.

One decade after *Brown*, Congress set the stage for federal enforcement of the *Brown* mandate by enacting Title VI of the Civil Rights Act of 1964.⁹⁰ Title VI prohibits recipients of federal financial assistance from engaging in purposeful discrimination. In the field of education,

88. For a discussion of what role an administrator's objectives should play in defining effectiveness, see Devins, *Defining Effective Civil Rights Enforcement in Education*, 86 COLUM. L. REV. 1093 (1986).

89. Title VII, Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235, 354-71, repealed by Education Amendments of 1978, Title VI, § 601(b)(2), 92 Stat. 2143, 2268.

90. 42 U.S.C. § 2000d-2000d(4) (1964).

the task of enforcing Title VI fell to the Office for Civil Rights (OCR) of the Department of Health, Education, and Welfare (now the Department of Education).⁹¹ During the mid-1960's, the OCR—armed with the power to cut off federal education funds—was remarkably successful at combating racial discrimination in education.⁹² In 1965 alone, more actual desegregation of southern schools⁹³ occurred than in the entire decade following *Brown*.⁹⁴ By the end of the 1960's, the efforts of the federal government had dramatically eroded southern school segregation. For example, between 1965 and 1968, the percentage of black children confined to all-black schools in the South dropped from ninety-eight percent to twenty-five percent.⁹⁵

Federal funding of desegregation under ESAA also reveals that centralization programs can accomplish their objectives. In order to receive ESAA funds, school districts had to be implementing a plan requiring desegregation of children and faculty. Moreover, under OCR regulations, ESAA assistance was limited to school district practices that did not have a disproportionate impact on minority students.⁹⁶ School districts found in violation of this requirement, however, could secure waivers if they agreed to take specific, remedial desegregation actions. One measure of the effectiveness of this process is that, between 1975 and 1981, of the 731 districts declared ineligible by the OCR, 502 or sixty-nine percent secured waivers.⁹⁷ Another measure of the program's effectiveness is its success in bringing about student reassignments. During a two-year period in the 1970's, ESAA resulted in the reassignment of approximately 244,000 school children from racially isolated classes.⁹⁸ David Tatel, former director of the OCR, characterized ESAA as "among the most effective ways of enforcing nondiscrimination provisions of law and ensuring equal [educational] opportunities."⁹⁹

91. For a review of OCR Enforcement of Title VI, see Devins, *supra* note 88.

92. See Devins & Stedman, *supra* note 3, at 1246. As Kirp writes, "During the mid-1960's, Congress, the executive branch, and the courts acted in concert, exercising extraordinarily effective leadership." Kirp, *School Desegregation and the Limits of Legalism*, 47 PUB. INTEREST 101, 101 (Spring 1977).

93. "Southern schools" refers to school systems which, prior to *Brown*, were officially segregated under so-called Jim Crow statutes.

94. See Devins & Stedman, *supra* note 3, at 1246 n.6.

95. G. ORFIELD, PUBLIC SCHOOL DESEGREGATION IN THE UNITED STATES, 1968-80, at 5 (1983).

96. See Board of Educ. v. Harris, 444 U.S. 130 (1979).

97. J. Stedman, *The Possible Impact of the Education Consolidation and Improvement Act of 1981 on Activities That Have Been Funded Under the Emergency School Aid Act*, Cong. Res. Service (Jan. 11, 1982), reprinted in *School Desegregation: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 733, 746-47 (1982).

98. *Id.* at 747-48.

99. *Id.* at 749 (statement of David Tatel). ESAA, while accomplishing its administrator's objectives, was so unpopular that it was repealed in 1981 as part of the "New Federalism" in

The failure of *School Days* to discuss these programs adequately is remarkable and disturbing. Aside from their practical and symbolic import, these programs demonstrate that centralization can accomplish its objectives. Moreover, to assess the appropriateness of centralization, one must determine the characteristics of an effective program. Without that understanding, the appropriate balance of power in educational policy will be determined with blinders on, and the results might well be short-sighted and harmful.

CONCLUSION

Certain policy objectives can only be accomplished through coercive techniques. The determination of what policy objectives justify the use of such techniques is the harder question. While near-universal consensus exists on the evils of segregation and the inappropriateness of government finance of discriminatory institutions, there is widespread and bitter disagreement on both structural matters (the appropriate federal role) and specific issues (busing, school prayer, student rights, and bilingualism). Indeed, some of the most divisive issues in recent years arise from the implementation of the *Brown* mandate.

School Days makes a valuable contribution toward an understanding of how to balance the competing interests. It does an excellent job of describing the defects of administrative and court-ordered reform. The book's case studies will prove helpful to lawmakers, administrators, and judges in their attempts to implement reform proposals or constitutional mandates.

Kirp and Jensen's collection, however, focuses too narrowly on inefficiencies in various educational reform efforts. Although some of the authors suggest reforms in existing programs, insufficient guidance is provided for determining how much—if any—centralization is appropriate.¹⁰⁰ Greater attention should be paid to the social purposes served by

education. Congress simply was no longer willing to support a program that, through the use of statistical measures of discrimination, placed a stranglehold on school board eligibility.

Public support for equal educational opportunity had not altogether waned, however. In 1983, Congress enacted the Magnet School Assistance Program, 20 U.S.C. §§ 4051-62, which emphasizes voluntary desegregation techniques and trust in local school systems. To be eligible for the program, a school district need not demonstrate that its policies result in actual desegregation. Conversation with Phil Kiko, Department of Education's Office of Civil Rights (Sept. 3, 1986). Instead, by funding district-proposed specialized schools, the Magnet School Program is designed to attract applications from a representative cross-section of students. The shift from ESAA to the Magnet School Program reflects both public support of *Brown* and public opposition to coercive desegregation techniques.

100. In his Introduction, Kirp writes that many of the essays recognize that "the present regulatory regime may be preferable to the politically likely alternatives, and that . . . reform is sounder than policy abdication at the national level." Kirp, *supra* note 11, at 13. *SCHOOL DAYS*, however, does not bear out this contention.

centralization, the role of public opinion, and the instances where centralization is effective.

Aside from pointing to ways in which *School Days* could be improved, I have suggested in this Review that centralization conforms to some degree with popular opinion.¹⁰¹ For example, the middle-ground approach now utilized in the granting of federal tax-exempt status to private schools may reflect public consensus on this issue. Private schools cannot engage in discrimination and receive federal assistance, and numerical measures of discrimination are inappropriate. I have also argued that, since education is a public function, it is appropriate that centralization be a reflection of public consensus.

The centralization debate is likely to heat up in the next few years. The rapid accumulation of state regulation and legislation engendered by the Excellence in Education movement undoubtedly will provoke further controversy in this area. Whether the next generation of policymakers will avoid the pitfalls explicated in *School Days* remains to be seen. These individuals will be well served by a careful reading of this collection, for—whatever its faults—*School Days* is a valuable reference point for the shaping of policy in this area.

101. See *supra* notes 67-78 and accompanying text.